

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

KENNETH PHELON and JOLICIA KELLEY,

Plaintiffs,

vs.

JEREMY D. HAMMAN, et al.,

Defendants.

Case No: C 09-3393 SBA

**ORDER DENYING PLAINTIFFS'  
RENEWED APPLICATION TO  
PROCEED IN FORMA PAUPERIS  
ON APPEAL**

The parties are presently before the Court on Plaintiffs' renewed application to proceed in forma pauperis on appeal.<sup>1</sup> Dkt. 80. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby DENIES Plaintiffs' application for the reasons set forth below.

**I. BACKGROUND**

On July 23, 2009, Plaintiff Kenneth D. Phelon ("Phelon") filed a pro se complaint against various Oakland police officers and other individuals and entities, pursuant to 42 U.S.C. § 1983, claiming that his civil rights were violated in connection with an ongoing state court criminal misdemeanor proceeding. On September 23, 2009, certain defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. 12. Phelon failed to file an opposition or statement of non-opposition, as required by Civil Local Rule 7-3. However, on December 1, 2009, Phelon filed a Motion for Leave to Amend the Complaint to

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<sup>1</sup> Plaintiffs' initial application to proceed in forma pauperis on appeal was denied, without prejudice, because Plaintiffs had failed to provide the information necessary to assess their application. See 3/1/11 Order, Dkt. 78.

1 Add Plaintiff to join Jolicia Kelley (“Kelley”) as a plaintiff. Dkt. 26. On January 8, 2010,  
2 Defendants filed a statement of non-opposition to Phelon’s motion for leave to amend. Dkt.  
3 28. Thus, on January 11, 2010, the Court granted Phelon’s motion for leave to amend, and  
4 ordered Phelon to file his amended complaint by January 25, 2010. Dkt. 31.

5 In violation of the Court’s Order, Phelon failed to file an amended complaint by the  
6 January 25, 2010, deadline. Instead, on February 22, 2010, Phelon filed a motion to stay the  
7 state court criminal proceeding. On March 23, 2010, the Court denied Phelon’s motion to stay  
8 and directed him to file his amended complaint by March 31, 2010. Dkt. 37.

9 Phelon failed to file his amended complaint by March 31, 2010, as ordered by the  
10 Court. Instead, on April 8, 2010, Phelon filed a motion to stay the instant action pending his  
11 release from state custody. Dkt. 38. On June 3, 2010, this Court denied Phelon’s motion  
12 without prejudice. Dkt. 40. In its ruling, the Court explained that Phelon had failed to indicate  
13 when he expected to be released from custody, and failed to disclose the status of the pending  
14 charges or the circumstances that may affect his release date. Id. The Court explained that  
15 absent such information, it was unable to make an informed decision as to whether a temporary  
16 stay was warranted. Id. The Court indicated that Phelon could renew his motion in order to  
17 rectify these deficiencies.

18 On July 2, 2010, Phelon renewed his motion to stay, but later withdrew the motion on  
19 August 25, 2010. Dkt. 49. He did not, however, file an amended complaint. Thus, on  
20 September 3, 2010, the Court issued an Order in which it noted that Phelon had not filed an  
21 amended complaint, notwithstanding the fact that *more than seven months* had passed since his  
22 initial filing deadline. The Court therefore ordered that by no later than September 13, 2010,  
23 Phelon was either to file an amended complaint or an opposition to the motion to dismiss,  
24 which had been filed in September 2009. Dkt. 52. The Court warned Phelon that the failure to  
25 comply with its instructions would constitute grounds for dismissal of the action without  
26 further notice, in accordance with Federal Rule of Civil Procedure 41(b). Id. at 3. On  
27 September 10, 2010, Phelon filed a request to extend his filing deadline from September 13 to  
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1 September 23, 2010. Dkt. 54. The Court granted Phelon's request. Dkt. 55. Phelon and  
2 Kelley filed a First Amended Complaint on September 23, 2010. Dkt. 56.

3 On October 25, 2010, and December 14, 2010, Defendants respectively filed three Rule  
4 12(b)(6) motions to dismiss the First Amended Complaint, which they noticed for hearing on  
5 January 25, 2011. Under Civil Local Rule 7-3, any response to a noticed motion is due no later  
6 than twenty-one prior to the hearing date. As such, Plaintiffs' oppositions or statements of  
7 non-opposition were due by January 4, 2011. On January 18, 2011, having received no  
8 response from Plaintiffs, the Court dismissed this action under Rule 41(b) on the ground that  
9 Plaintiffs failed to file an opposition to Defendants' motions, and given that the Court  
10 previously considered less drastic alternatives by extending Phelon's deadline to file his  
11 amended complaint on numerous occasions instead of simply dismissing the action for failure  
12 to comply with a Court Order. See 1/18/11 Order at 4, Dkt. 69.

## 13 **II. ANALYSIS**

14 Plaintiffs have now filed a renewed application to proceed in forma pauperis on appeal.  
15 Title 28 U.S.C. § 1915(a)(3) states: "An appeal may not be taken in forma pauperis if the trial  
16 court certifies in writing that it is not taken in good faith." The good faith requirement is  
17 satisfied if the petitioner seeks review of any issue that is "not frivolous." Gardner v. Pogue,  
18 558 F.2d 548, 551 (9th Cir. 1977) (quoting Coppedge v. United States, 369 U.S. 438, 445  
19 (1962)). An action is "frivolous" for purposes of section 1915 if it lacks any arguable basis in  
20 law or fact. Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989); Franklin v. Murphy, 745 F.2d  
21 1221, 1225 (9th Cir. 1984).

22 Plaintiffs' appeal of the Court's Order dismissing their claims for lack of prosecution is  
23 frivolous. The record contains several examples of Phelon and Kelley's failure to prosecute  
24 their claims. For instance, they failed to respond to Defendants' motions to dismiss, Phelon  
25 ignored three Court Orders directing him to file an amended complaint, and Phelon filed two  
26 requests to stay this action. Moreover, the Court provided Plaintiffs with multiple  
27 opportunities to continue prosecuting this action, despite their lack of diligence. These factors  
28 all support dismissal under Rule 41(b).

1 For the reasons stated above, the Court CERTIFIES that Plaintiffs' appeal is not taken  
2 in good faith within the meaning of 28 U.S.C. § 1915(a)(3). Plaintiffs' renewed application to  
3 proceed in forma pauperis on appeal is DENIED. This Order terminates Docket 80.

4 IT IS SO ORDERED.

5 Dated: April 18, 2011

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7 SAUNDRA BROWN ARMSTRONG  
8 United States District Judge  
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1 UNITED STATES DISTRICT COURT  
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10 Case Number: CV09-03393 SBA

11 **CERTIFICATE OF SERVICE**

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
13 Court, Northern District of California.

14 That on April 18, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said  
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing  
16 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
17 located in the Clerk's office.

18 Jolicia Kelley  
19 2932 55th Avenue  
20 Oakland, CA 94605

21 Kenneth D. Phelon  
22 2932 - 55th Avenue  
Oakland, CA 94605

23 Dated: April 18, 2011

24 Richard W. Wieking, Clerk

25 By: LISA R CLARK, Deputy Clerk  
26  
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